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September 3, 1996

Office of the Secretary
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Washington, D.C. 20554

Re: CC Docket No. 96-152

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Gentlemen:

Please find enclosed for filing an original plus eleven copies of the COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed postage pre-paid envelope.

Yours truly,



Patrick S. Berdge
Attorney for California

PSB:cdl

Enclosures

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for filing

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Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)	FCC 96-308
)	
Implementation of the Telecommunications)	CC Docket No. 96-152
Act of 1996)	
)	
and)	
)	
Telemessaging, Electronic Publishing,)	
and Alarm Monitoring Services)	
_____)	

**COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA
AND THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA
ON THE NOTICE OF PROPOSED RULEMAKING**

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I. INTRODUCTION

The People of the State of California and the Public Utilities Commission of the State of California ("California" or "CPUC") hereby respectfully submit these comments to the Federal Communications Commission ("FCC" or "Commission") on the notice of proposed rulemaking ("NPRM") regarding rules to implement, and, where necessary, to clarify the non-accounting separate affiliate and nondiscrimination safeguards prescribed by Congress in §§ 274, 275, and 260 with respect to Bell Operating Companies ("BOC") and/or Local Exchange Carrier ("LEC") provision of electronic publishing, alarm monitoring and telemessaging services, respectively. These safeguards are intended to protect subscribers to BOC monopoly services (such as local telephony) against the potential risk of having to pay costs incurred by BOCs to enter competitive services (such as electronic publishing, alarm monitoring and telemessaging services). They also serve to protect new competitors from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in the new markets the BOCs now seek to enter. This NPRM is issued pursuant to the Telecommunications Act of 1996 ("the Act").

II. SUMMARY

As with the BOC In-Region NPRM (CC Docket No. 96-149), California questions the NPRM's broad interpretation of the FCC's jurisdiction over traditional state concerns such as intrastate telemessaging telecommunications

services. The NPRM's conclusions regarding the FCC's ability to govern intrastate regulation of telecommunications services lack adequate legal foundation. In lieu of direct involvement in the regulatory affairs and police powers of the states, the CPUC urges the FCC in this rulemaking to recognize the jurisdiction of the states in determining the scope of regulation of intrastate services under the Act and to issue guidelines and expositions so that the states may adopt their own regulations under the Act. These guidelines would be especially helpful in allowing the states' to chart their own course of action under the Act consistent with the rules promulgated by the FCC.

III. DISCUSSION

A. Scope Of California's Jurisdiction

The FCC's tentative conclusion that its rules apply to both interstate and intrastate services¹ are of the utmost concern to California. This tentative conclusion would effectively nullify § 2 (b) of the Communications Act of 1934 ("the 1934 Act").² The CPUC opposes the FCC's broad interpretation on the grounds that it would preempt states in intrastate telecommunications matters in violation of both the 1934 Act and the 1996 Act and the Congressional intent

¹ NPRM ¶ 20.

² Section 152(b) of the 1934 Communications Act.

underlying them.³ Congress envisioned joint federal/state coordination in opening up the telecommunications network to competition.

**B. The FCC's Jurisdiction Over Intrastate
Telemessaging Services**

The NPRM notes that in the BOC In-Region NPRM⁴, the Commission tentatively concluded that telemessaging is an information service that, when provided by BOCs on an interLATA basis, is subject to the requirements of § 272 in addition to the requirements of § 260. The Commission also tentatively concluded that its authority under §§ 271 and 272 applies to both the intrastate and interstate interLATA information services provided by the BOCs and their affiliates. The NPRM solicits comments on whether, in light of its tentative conclusion that §§ 271 and 272 give the Commission jurisdiction over intrastate interLATA information services including telemessaging, § 260 also gives the FCC jurisdiction over intrastate interLATA telemessaging services in implementing and enforcing § 260.

As explained in California's Comments on the BOC In-Region NPRM, California strongly disputes the Commission's conclusions which would supplant the states' regulation over intrastate operations with the FCC's. The FCC's

³ Neither §§ 251 or 252 of the 1996 Act gives the FCC authority over intrastate functions. The FCC has "... note[d] that sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions." (Local Competition NPRM, CC Docket # 96-98 ¶ 40.)

⁴ CC Docket No. 96-149

tentative conclusion would negate the states' rights to regulate intrastate operations, in violation of § 2(b) of the Communications Act of 1934. The NPRM goes too far in ignoring the jurisdiction afforded the states in § 2(b) of the Act of 1934. As the BOC In-Region NPRM notes:

Section 2(b) provides that, except as provided in certain enumerated sections not including sections 271 and 272, "nothing in [the Communications Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier" ⁵

The NPRM further notes that the scope of § 260, on its face, is not strictly limited to interLATA services, nor is it limited to the BOCs, but applies to all incumbent LECs.⁶ The NPRM seeks comment on whether any such intrastate jurisdiction would extend only to the BOCs, as only BOCs are covered by §§ 271 and 272, or to all incumbent LECs. California believes that Congress, in passing the Act, in no way intended to transfer the power to regulate intrastate services to the FCC as suggested in the NPRM, whether those services are provided by BOCs or LECs.

The NPRM also seeks comment on the extent to which, assuming § 260 does not itself apply to intrastate service, the Commission may nevertheless

⁵ BOC In-Region NPRM ¶ 26.

⁶ NPRM ¶ 20.

have authority to preempt state regulation with respect to the matters addressed by § 260.⁷

The NPRM accordingly seeks comments on:

1. the extent to which it may not be possible to separate the interstate and intrastate portions of the regulations we propose here to implement sections 271 and 272, and
2. the extent to which state regulation inconsistent with our regulations may thwart or impede the Commission's exercise of lawful authority over interstate interLATA services.⁸

The CPUC does not dispute that certain preemptive powers are provided the FCC under the Act. However, to preempt state law, the FCC will have the burden of establishing that state law does indeed thwart or impede the exercise of the Commission's rightful interstate jurisdiction. To the extent that the FCC can demonstrate that a state's laws or regulations do not provide adequate safeguards of the type provided by the MFJ and outlined within the NPRM, they may be preempted. But it is unlikely that the states would fail to adopt their own similar rules in this regard.

The NPRM also seeks comment on the extent to which the Commission would not have the authority to preempt the state regulation of an intrastate

⁷ NPRM ¶ 21.

⁸ *Ibid.*

telemessaging service.⁹ The FCC does not have the authority to preempt state regulation of an intrastate telemessaging service as long as the state regulation is consistent with the Act and the rules promulgated by the FCC. To establish preemption, the FCC must meet its affirmative duty to show that the state regulation actually thwarts or impedes the FCC's rightful exercise of authority.

C. The FCC's Jurisdiction Over Intrastate Electronic Publishing Services

The NPRM notes that § 274 imposes a number of safeguards on the BOCs in the area of electronic publishing. Unlike §§ 260 and 275, § 274 specifically refers to state commission jurisdiction regarding one of these safeguards. Section 274 (b)(4) provides that a separated affiliate or joint venture and the BOC with which it is affiliated shall:

value any assets that are transferred directly or indirectly from the Bell operating company to a separated affiliate or joint venture, and record any transactions by which such assets are transferred, in accordance with such regulations as may be prescribed by the Commission or State commission to prevent improper cross subsidies.¹⁰ [Emphasis added.]

The NPRM tentatively concludes that the Commission may not have exclusive jurisdiction over all aspects of intrastate services pursuant to § 274.

⁹ *Ibid.*

¹⁰ NPRM ¶ 23.

The Commission seeks comment specifically on the extent of its authority, if any, under § 274 over intrastate electronic publishing services.¹¹

In this instance, the Act itself specifies that state Commissions may prescribe regulations governing the valuation of assets that are transferred from the BOC to a separated affiliate or joint venture and governing the recording of such transactions. Therefore, there can be no question regarding the states' authority over promulgating such rules. This provision of the Act affirms the position of the states that they have always had, and will continue to have under the Act, the authority to govern intrastate commerce. The Act does not provide any additional jurisdiction to the states but simply recognizes their existing authority over intrastate matters. The FCC's authority over intrastate electronic publishing services continues to be limited to the promulgation of minimum standards and rules applicable to the BOC's interstate jurisdiction.

The NPRM notes that § 274(e) provides that any person claiming a violation of this section may file a complaint with the FCC, or may bring suit pursuant to § 207.¹² The NPRM asks parties to clearly identify the Commission's jurisdiction under § 274 over intrastate electronic publishing services, particularly in light of the specific provisions of §§ 274(b)(4) and 274(e), and to clearly identify whether specific subsections of § 274 confer intrastate authority on the

¹¹ *Ibid.*

¹² NPRM ¶ 24.

FCC.¹³ The Act is clear with regard to jurisdiction over complaints under § 274, namely, that an aggrieved party may file with either the FCC or in district court. However, this provision does not negate the important role that states may play in attempting to resolve disputes, prior to the filing of complaints and lawsuits in the federal arena. Moreover, while the Act designates the FCC and Federal Courts as having review and enforcement authority for complaints, it does not provide for a blanket transfer of intrastate regulatory authority from the states to the FCC.

The NPRM seeks comment on the extent, apart from any intrastate jurisdiction conferred by § 274 itself, to which the Commission may have authority to preempt state regulation with respect to the matters addressed by §274 under *Louisiana PSC*.¹⁴ As with telemessaging services, the NPRM also seeks comment on the extent to which, assuming § 275 does not itself apply to intrastate service, the Commission may nevertheless have authority to preempt state regulation with respect to the matters addressed by § 275.

California reiterates its earlier arguments, *supra*, namely, that the CPUC does not dispute that certain preemptive powers are provided the FCC under the Act. However, to preempt state law, the FCC will have the burden of establishing

¹³ *Ibid.*

¹⁴ NPRM ¶ 25; see *Louisiana Public Service Commission v. Federal Communications Commission et al.*, 476 U.S. 355; 106 S.Ct. 1890; 90 L. Ed.2d 369; 54 U.S.L.W. 4505, 1986 U.S. LEXIS 74.

that state law does indeed thwart or impede the exercise of the Commission's rightful interstate jurisdiction. To the extent that the FCC can demonstrate that a state's laws or regulations do not provide adequate safeguards of the type provided by the Act and outlined within the NPRM, they may be preempted. But, as previously stated, it is unlikely that the states would fail to adopt their own similar rules in this regard.

D. The FCC's Jurisdiction Over Intrastate Alarm Monitoring Services

The NPRM seeks comments on the extent of its authority under § 275 over intrastate alarm monitoring services, and the extent to which it may have authority to preempt state regulation with respect to the matters addressed by §275 pursuant to *Louisiana PSC*. California refers to its comments, *supra*, on the jurisdictional issues relative to telemessaging services which apply equally to alarm monitoring services.

IV. CONCLUSION

For the reasons stated, as with the *BOC In-Region NPRM*, California urges the FCC not to issue strict national rules regarding structural requirements, means of regulating, or enforcement of the BOCs' provision of intrastate telemessaging, electronic publishing, and alarm monitoring services which would constrain the states from implementing their own rules in the intrastate arena similar to those proposed in this NPRM. Instead, California proposes that the FCC establish

guidelines for the states in these areas with sufficient explanation as to allow the states the ability to coordinate with the FCC's rules and comply with the Act.

Dated: September 3, 1996

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charlene D. Lundy, hereby certify that on this 3rd day of September, 1996, a true and correct copy of the foregoing COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING in FCC 96-308, CC Docket No. 96-152, was mailed first class, postage prepaid to all known parties of record.



Charlene D. Lundy